

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2014-346-WS

IN RE:)	DIUC RESPONSE TO ORS MOTION
)	TO COMPEL
Application of Daufuskie Island Utility)	
Company, Inc. for Approval of an)	
Increase for Water and Sewer Rates,)	
<u>Terms and Conditions.</u>)	

Daufuskie Island Utility, Inc. (“DIUC”) hereby submits this Response to the Motion to Compel filed by the South Carolina Office of Regulatory Staff (“ORS”) on August 17, 2020 (“the Motion”). As set forth herein, the Motion should be denied.

I. BRIEF SUMMARY OF RELEVANT PROCEDURAL HISTORY.

On June 9, 2015, DIUC initiated this proceeding by filing an Application for Approval of an Adjustment in Rates and Charges for Water and Sewer Services (“the Application”). The Application was filed pursuant to S.C. Code Ann. Section 58-5-240 and 10 S.C. Code Ann. Regs. Sections 103-712.4.A and 103-512.4.A. The other parties to these proceedings are Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., Bloody Point Property Owner's Association (collectively “Intervenors” or POAs”) and the South Carolina Office of Regulatory Staff (“ORS”).

In the five years that have passed since DIUC’s initial filing, the Commission has conducted two full evidentiary hearings on DIUC’s application and there have been two appeals to the South Carolina Supreme Court. *See DIUC v. S.C. Office of Reg. Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) (hereinafter “*DIUC I*”) and *DIUC v. S.C. Office Reg. Staff*, 427 S.C. 458, 832 S.E.2d 572 (2019) (hereinafter “*DIUC II*”).

On July 24, 2019, the Supreme Court entered its decision in *DIUC II*, reversing and remanding the matter back to the Commission, this time for a third hearing. *See DIUC II*, 427 S.C. 458, 832 S.E.2d 572 (2019), *reh'g denied* (Sept. 27, 2019). ORS filed a Motion for Rehearing, which the Supreme Court denied stating, “the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing.” After the Supreme Court denied ORS’s Motion for Rehearing and remitted the case to the Commission, the parties briefed and presented to the Commission their differing positions as to the scope and purpose of the third hearing. DIUC advocated its position based upon the Supreme Court’s decision and the parameters the Court established. *See DIUC Memorandum on Matters to be Addressed on Remand (January 16, 2020)* and *DIUC Supplemental Brief Regarding Second Remand (April 1, 2020)*.

Via Order No. 2020-48H dated June 9, 2020, the Commission set a schedule for prefilings testimony and a third hearing. Pursuant to the applicable schedule, DIUC filed its second rehearing direct testimony on June 16, 2020, and ORS filed its second rehearing direct testimony on July 7, 2020.

II. THE MOTION TO COMPEL SHOULD BE DENIED.

A. THE DISCOVERY AT ISSUE.

Two weeks after receiving DIUC’s direct testimony, ORS served a single Request for Production as follows:

ORS Request 1-1

Please provide all documents that support Rate Case Expenses of \$269,356 as identified in the Second Rehearing Direct Testimony of John F. Guastella (p. 17, l. 6) including, but not limited to, the calculation, reconciliation and vendor invoices.

- (a) Please provide all documentation to demonstrate the invoices that are included in the amount of \$269,356 have been paid by DIUC.**

See Exhibit A, SC ORS'S First Continuing Request for Production (June 29, 2020). ORS's Request for Production included a July 10, 2020, response date.

On July 10, 2020, DIUC responded to the Request for Production. *See Exhibit B, DIUC Responses to SC ORS's First Continuing Request for Production of the Second Remand (July 10, 2020)* (hereinafter "Request 1-1"). As is often the case with discovery responses, the DIUC Response to Request 1-1 included certain legal objections.¹ Then, subject to and preserving its objections, the DIUC Response identifies (as requested) the following sources of information regarding the Rate Case Expenses:

Documents supporting the Rate Case Expenses sought by DIUC were produced with DIUC's Responses to Office of Regulatory Staff's First Continuing Audit Information Request in Proceeding on Remand dated October 27, 2017 and Attachment to ORS 1-12 Rate Case Expenses therewith produced.

DIUC also previously provided ORS and the Commission support for its requested Rate Case Expenses, through testimony and exhibits. *See* Transcript of Proceedings (October 28, 2015), Transcript of Proceedings (December 6 and 7, 2017), Prefiled Second Rehearing Testimony of John F. Guastella (June 16, 2020).

DIUC incorporates and relies upon these documents and transcripts. Provided herewith is a one-page chart entitled GA Rate Case Invoices and Payments to Date.

Additional testimony and documents may also be provided as this second rehearing proceeding continues, including future testimony, both prefiled and live testimony, and exhibits.

Exhibit B, DIUC Response to Request 1-1.

Included with the Response was a spreadsheet showing the invoices and payment dates for DIUC's payment for GA rate case expenses. *See Exhibit B.*

¹ DIUC objected to the Request as "unduly burdensome" and because the Request "seeks to impose a higher level of scrutiny and an increased burden of production regarding the extensive documentation DIUC has already provided to ORS and to the Commission regarding DIUC's Rate Case Expenses." *Exhibit B, DIUC Response to Request 1-1.*

GA Rate Case Invoices and Payments to Date

	<u>GA Consulting - Rate Case Docket No 2014-346-WS</u>	<u>Invoice No.</u>	<u>Due</u>	<u>Paid</u>
	Invoiced 7.10.14	133	\$ 1,612.50	12.1.14
	Invoiced 9.5.14	139	\$ 16,687.50	12.1.14
	Invoiced 10.14.14	145	\$ 5,130.00	12.1.14
	Invoiced 11.11.14	151	\$ 13,122.50	8.22.18
	Invoiced 12.9.14	165	\$ 14,600.00	8.22.18
	Invoiced 1.5.15	170	\$ 19,932.50	8.22.18
	Invoiced 2.10.15	179	\$ 25,239.02	8.22.18
	Invoiced 3.6.15	184	\$ 15,692.50	8.22.18
	Invoiced 4.8.15	192	\$ 4,792.50	8.22.18
	Invoiced 5.20.15	204	\$ 17,992.50	8.22.18
	Invoiced 6.5.15	209	\$ 19,067.48	8.22.18
	Invoiced 7.1.15	211	\$ 53,810.00	8.22.18
	Invoiced 8.10.15	215	\$ 67,860.00	8.22.18
	Invoiced 10.14.15	223	\$ 19,870.00	8.22.18
	Invoiced 11.9.15	228	\$ 82,695.34	10.10.19
	Invoiced 12.11.15	232	\$ 37,812.50	11.16.19
	Invoiced 1.6.16	236	\$ 17,412.50	11.16.19
	Invoiced 2.4.16	242	\$ 14,652.50	3.18.20
	Invoiced 3.12.16	247	\$ 3,772.50	3.26.20
	Invoiced 5.16.16	259	\$ 5,562.50	3.26.20
	Invoiced 6.21.16	263	\$ 8,522.50	3.26.20
	Invoiced 7.13.16	269	\$ 5,617.50	3.26.20
	Invoiced 8.12.16	274	\$ 2,537.50	3.26.20
	Invoiced 9.6.16	277	\$ 15,357.50	3.26.20
	Invoiced 11.18.16	288	\$ 1,307.50	6.26.20
	Invoiced 1.9.17	292	\$ 22,117.50	6.26.20
	Invoiced 7.17.17	327	\$ 7,825.00	6.26.20
	Invoiced 8.18.17	333	\$ 2,325.00	
	Invoiced 9.15.17	335	\$ 9,700.00	
	Invoiced 10.17.17	337	\$ 10,351.25	
	Total as of November 1, 2017		\$ 542,978.09	

Amoujnt Paid to date

\$ 520,601.84

Note: Does not include subsequent billings.

Submitted in Response to ORS Second Rehearing Request 1-1
July 10, 2020

Excerpted from *Exhibit B, DIUC Response to Request 1-1 at p.4.*

As shown, this chart provides ORS with a listing of every single invoice and includes for every invoice: the date of invoice, the invoice number, amount due, amount paid, and date of payment. *Id.* In addition to this chart, ORS already has every invoice that makes up the \$542,978, because they were the subject of extensive ORS testimony in the rehearing. *See Transcript of Proceedings (December 6 and 7, 2017) (including testimony of ORS witness Dawn Hipp); see also Order 2018-68 at p.37 (discussing Ms. Hipp's opinions regarding the GA invoices).* Comparing the text of Request 1-1 to the Response and the chart provided by DIUC demonstrates DIUC fully responded to the Request.

Despite this ample information, ORS was not satisfied. So, as indicated in the Motion, on July 23, 2020, ORS counsel emailed regarding DIUC's Response to Request 1-1 stating:

ORS would once again reiterate the request that all documentation that demonstrates payment of these invoices be provided. While certainly not exhaustive, examples of documentation that may indicate payment would include copies of cancelled checks or ACH transactions.

See Exhibit C, Email from Bateman to Gressette (July 23, 2020). Then, on July 24, 2020, ORS served DIUC with its Second Continuing Request for Production of the Second Remand. *See Exhibit D, SC ORS's Second Continuing Requests for Production (July 24, 2020).*

In response to the email requesting evidence of payment of the invoices and receipt of the Second Request, on August 7, 2020, DIUC served a Supplemental Response to Request 1-1 along with its Response to the newly issued Request 2-1. *See Exhibit E, DIUC's Supplemental Response to First ORS Request and Initial Response to Second ORS Request for Production (August 7, 2020).* As with the original Response to Request 1-1, DIUC included legal objections and then responded. With this Supplemental Response, DIUC provided copies of DIUC's banking account statements showing that every one of the specific payments identified in the spreadsheet previously

provided had, in fact, been paid.² *Id.*

B. DIUC HAS PROPERLY AND COMPLETELY RESPONDED TO REQUEST 1-1. THERE IS NOTHING FOR THE COMMISSION TO “COMPEL”.

DIUC has fully responded to Request 1-1, and there is nothing more to compel. Despite objections to the breadth, burden, and scope of the discovery, DIUC has provided a complete information that satisfies Request 1-1.

The Request by its own terms asks DIUC to provide:

- all documents that support Rate Case Expenses of \$269,356
- including, but not limited to, the calculation, reconciliation and vendor invoices.

The Request then asks:

- Please provide all documentation to demonstrate the invoices that are included in the amount of \$269,356 have been paid by DIUC.

See Exhibit A.

As demonstrated by DIUC’s Response and Supplemental Response to Request 1-1, *Exhibit B* and *Exhibit D*, ORS has been provided all of the following:

1. **Documents produced with DIUC’s Responses to Office of Regulatory Staff’s First Continuing Audit Information Request in Proceeding on Remand dated October 27, 2017;**
2. **Attachment to ORS 1-12 Rate Case Expenses produced October 27, 2017;**
3. **Testimony of witnesses and exhibits in Transcript of Proceedings (October 28, 2015);**
4. **Testimony of witnesses and exhibits in Transcript of Proceedings (December 6 and 7, 2017);**

² As DIUC has explained, whether an invoice is “paid” is not relevant for accounting purposes. An unpaid invoice is still due. Delayed payments that create accounts payable do not mean that costs are not incurred and/or the costs are not allowable for rate setting purposes. *See Rehearing Tr. at pp. 87-89.*

5. **Prefiled Second Rehearing Testimony of John F. Guastella (June 16, 2020);**
6. **Chart entitled GA Rate Case Invoices and Payments to Date;**
7. **Bank statement excerpts and transfer records corresponding to entries in the chart GA Rate Case Invoices and Payments to Date;**
8. **Information necessary to address whether any of the invoices were aggregated into a single payment, to assist ORS in tracking the payment to the bank statement;**
9. **Verified statement that no late fees were paid;**
10. **Verified statement that no surcharges were paid;**
11. **Verified statement that no penalties were paid;**
12. **Verified statement that no interest was paid;**
13. **Verified statement of information regarding approval of the invoices for payment;**
14. **Verified statement of information regarding the individual responsible for processing the payments.**

See Exhibit B and Exhibit D. This information is quite literally **everything** that ORS Request 1-1 asks for. There is nothing more to compel, and the Motion should be denied.

C. DIUC’S LEGAL OBJECTIONS ARE PROPER TO PRESERVE ITS POSITIONS.

In the Motion, ORS also takes issue with the legal positions and objections included in DIUC’s Responses.

First, such objections are customary and are envisioned by the Commission’s Rules of Procedures. *See S.C. Code Ann. Regs. § 103-833* (“Each request for production of documents and things shall be answered separately and fully in writing, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer.”).

Second, DIUC did not object and then withhold an answer, although that would have been appropriate in this instance. Instead, DIUC stated its position, and then subject to that position, fully responded to the Request. DIUC disagrees with ORS’s attempts to require further information and its application of a stricter standard of review than that which was applied to the

GA invoices in the initial hearing. There is nothing to “compel” just because the parties disagree about the scope of the eventual hearing and the standard ORS seeks to impose upon certain evidence.

Third, a motion to compel is not the proper vehicle for ORS to attempt to litigate the admissibility of evidence or the scope of the Commission’s review at rehearing. Those matters — the legal matters presented as objections— are properly addressed at the actual hearing. *See S.C. Code Ann. Regs. 103-846(B)* (“The presiding officer shall rule on the admissibility of all evidence and shall otherwise control the reception of evidence so as to confine it to the issues in the hearing.”).

Even if this were the proper time to consider these issues, ORS’s Motion does not present a single argument in response to the objections. Instead, the Motion attempts to manufacture doubt as to DIUC’s candor and completeness by interjecting insinuations without any substance. For example, regarding the chart entitled GA Rate Case Invoices and Payments to Date, the Motion includes the following attempt to create a sense of alarm where none is justified:

DIUC also included a one-page chart entitled “GA Rate Case Invoices and Payments to Date.” This was the first time in this proceeding, or any other, that DIUC asserted these invoices had been paid.

* * *

Therefore, it is reasonable to assume that DIUC's previously submitted responses and testimony may not have, in fact, provided all relevant documentation supporting the Rate Case Expenses for which DIUC now seeks recovery from its ratepayers.

Motion at p. 5 (emphasis added). The supposition that there has been some sort of incomplete response or that DIUC intentionally withheld information is totally ridiculous. It is as if ORS has not been participating in the same case with DIUC.

Throughout this entire proceeding, DIUC has made no secret about the fact that the rates ORS convinced the Commission to adopt in Order 2015-846 did not provide enough money for

DIUC to pay its bills, including its costs to GA. In fact, ORS objected to DIUC even being able to tell the Commission that the Settlement Agreement's completely insufficient rates would cause DIUC to default on its financing obligations. *See ORS Answer to DIUC Petition for Reconsideration and/or Rehearing (January 8, 2016) at pp. 1-2.*

DIUC could not afford to pay GA invoices until after the first appeal, rehearing, and finally the Order on Rehearing which incrementally increased DIUC's rates. The Commission denied reconsideration of the Order on Rehearing in May of 2018, making the rehearing rates final pending the second appeal. As shown in the chart, GA Rate Case Invoices and Payments to Date the Motion, DIUC did not begin to pay the GA invoices until August of 2018 as the higher rates produced sufficient income to begin paying accounts payable to GA. *See, supra, p. 4.* By that time and in the months following, the case was on appeal to the Supreme Court. There was no reason for DIUC to provide a ledger of payments for GA invoices to ORS until ORS actually asked for it in July of 2020 via Request 1-1. When ORS asked, DIUC provided the information. The Motion's attempt to turn that timing into something sinister is completely improper, especially given ORS's knowledge of the complete facts.

DIUC has long asserted that whether the GA invoices were paid should not be a factor in the Commission's consideration. When ORS witness Hipp applied the higher scrutiny rejected by the Supreme Court, she complained about payment of the GA invoices.³ Mr. Guastella responded, testifying in response to ORS's statement that the GA invoices "do not appear to be paid by DIUC":

Ever since 2008 when DIUC was acquired from Haig Point, Inc. there have been repeated occurrences that created major cash flow shortages in response to which

³ *See DIUC II*, 427 S.C. at 460-461 and 832 S.E.2d at 573. (Supreme Court chastising ORS's actions on remand with regard to the GA Rate Case Expenses, labelling ORS's actions as "misconduct" and calling ORS's actions "retaliatory," "deeply troubling," "unprofessional," and lacking in proper "respect" for the rulings of the South Carolina Supreme Court).

the owners and GA have made it a priority to use available cash to provide service to the customers, with charges by GA accrued instead of being paid on a current basis. Delayed payments that create accounts payable do not mean that costs are not incurred and/or the costs are not allowable for rate setting purposes.

Rehearing Transcript at 87-89 and Applicant's Proposed Order on Remand (Dec. 15, 2017) at p.

39. The same position was repeated in DIUC's Motion for Reconsideration on Remand wherein DIUC objected to Ms. Hipp's analysis stating:

With respect to payment of invoices, the allowance of costs incurred by a utility does not depend on whether a bill has been paid or reflected on the books as an account payable; if a reasonable cost is incurred then it qualifies for rate setting purposes.

DIUC's Petition for Reconsideration on Rehearing, (Feb. 20, 2018) at p. 17.

ORS was certainly aware of this position, as ORS cited the same testimony in its Proposed Order on Remand, stating "DIUC witness Guastella also testified that delayed payments that create accounts payable does not mean that costs incurred are not allowable for rate setting purposes. (Rehearing Tr. p. 89, 11. 19-21)." *See ORS's Proposed Order Ruling on Application for Adjustments in Rates and Incorporating Order of Supreme Court (Dec. 15, 2017) at p.27.*

III. CONCLUSION

DIUC has properly asserted its legal positions and fully responded to Request 1-1. DIUC has not withheld anything based upon its objections; in fact, contrary to its legal position regarding the proper scope of the hearing, DIUC has completely responded to Request 1-1. There is nothing to "compel" and the Motion should be denied.

[signature page follows]

Respectfully submitted,

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September 3, 2020
Charleston, South Carolina

Attachments:
Exhibits A-E

CERTIFICATE OF SERVICE

This is to certify that on September 3, 2020, I caused to be served upon the counsel of record named below a copy of the foregoing **DIUC RESPONSE TO ORS MOTION TO COMPEL** via electronic mail, as indicated. A copy of the Response was also filed via the Commission's DMS.

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